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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RORY BERNARD PERCY, Defendant and Appellant.	B211292 (Los Angeles County Super. Ct. No. TA092520)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allen Joseph Webster, Jr., Judge. Affirmed as modified.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Rory Bernard Percy (appellant) guilty of carrying a loaded, unregistered firearm (Pen. Code, § 12031, subd. (a)(1))[1] (count 1); having a concealed firearm on his person (§ 12025, subd. (a)(2)) (count 2); and unlawful firearm activity (§ 12021, subd. (e)) (count 3). As to all counts, the jury found that the crimes were not committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A). The trial court sentenced appellant to three years in prison.

Appellant appeals on the grounds that: (1) the trial court erred in denying his suppression motion, since his arrest and the seizure of the firearm violated the Fourth Amendment; (2) the trial court violated his Sixth Amendment right to an impartial jury and his Fourteenth Amendment right to equal protection by denying his *Batson-Wheeler*[2] motion; (3) appellant's trial counsel was ineffective for not moving to bifurcate the trial on the street gang allegations from the substantive charges; (4) the defenses of necessity and/or duress should have been litigated in light of *District of Columbia v. Heller* (2008) ___U.S. ___ [128 S.Ct. 2783] (*Heller*), which upheld the right to bear arms in certain circumstances; and (5) the trial court erred in imposing concurrent sentences rather than staying counts 1 and 3 pursuant to section 654.

FACTS

Prosecution Evidence

On August 4, 2007, police officers were informed at roll call that the Bounty Hunter Bloods gang was having a large gathering at 109th Street Park, a gang stronghold, in Los Angeles County. Officers Justin Chi (Chi) and Tyson Hamaoka (Hamaoka) are partners and gang officers in the Los Angeles Police Department (LAPD), and they went to the park at approximately 4:15 p.m. to monitor the gang party. They saw quite a few people dressed in red attire—the color of the Bounty Hunter Bloods—inside the park.

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1 All further references to statutes are to the Penal Code unless stated otherwise.

2 *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

The partygoers were drinking out of beer bottles, and the smell of marijuana was pervasive. Chi and Hamaoka informed fellow officers of what they had seen, and the officers decided upon a tactical plan to monitor the party and enforce any violations of the municipal code that they observed. They also advised the airship of the party.

Chi, Hamaoka, and other officers returned to the park at 7:30 p.m. while it was still daylight, and there were many more people in attendance—200 to 400 people. Many of them were wearing red. There were also attendees who were apparently not from the gang.

The officers saw approximately eight to 15 males dressed in red towards the 110th Street entrance. The distinct odor of marijuana was coming from this group, and many of them were publicly drinking from beer containers. The officers drove slowly along 110th Street and saw appellant standing at the entrance also. Chi knew appellant from previous monitoring of the Nickerson Gardens Housing Project, another stronghold for the Bounty Hunter Bloods.

When Chi made eye contact with appellant, he saw appellant react in a surprised manner. Hamaoka believed appellant appeared startled and had "almost a panicked expression on his face." His eyes widened and he crouched and shrugged his shoulders. Chi and Hamaoka got out of their car to monitor appellant's behavior and that of the group of males. Appellant took a couple of steps backward and looked to his left and right. Hamaoka looked at appellant's pocket and waistband area and could see in appellant's right-hand pocket "a distinct bulge." The bulge was about four inches wide and was lying across the bottom of the right-hand pants pocket.

Hamaoka believed the bulge was a gun because it was a Bounty Hunter gang party with several males "dressed down" in red. It is very common for gang members to arm themselves with guns of a small caliber because it is easier to conceal. As Chi and Hamaoka started walking towards the group of males, appellant looked at them and then turned his back to them and quickly walked eastbound into the park. Hamaoka caught up with appellant and "placed a C-grip" on appellant's right arm. Appellant said, "Don't put

your fuckin' hands on me" and ran into the park. Hamaoka said "Stop. Police." Hamaoka chased appellant, followed by Chi and Officers Archie (Archie) and Young (Young).

As appellant ran, he was reaching into the area of his right pocket with both hands, as if trying to pry something out. Hamaoka believed appellant was trying to get the gun out to dispose of it. Hamaoka kept telling the other officers, "He's got a gun." Or simply, "Gun."

Hamaoka eventually grabbed appellant by the shirt and pulled him straight down to the ground. While on the ground, appellant's left arm was free but his right arm was in his waistband area, and he would not give police his right arm. Chi struck appellant approximately five times in the shoulder to have appellant comply and show his right hand, but he did not. Several officers repeatedly told appellant to stop resisting and to put his hands behind his back, but he did not comply. This occurred while an unruly crowd of 60 to 70 people was circling the officers, yelling abuse and throwing things. After Hamaoka struck appellant on the side of his face, he finally gave up his right hand, and police placed him in handcuffs. As soon as the officers lifted appellant off the ground, they saw a pistol at the spot where he had been lying. The gun was a stainless steel .25-caliber semiautomatic pistol, and its size was consistent with the bulge Hamaoka had seen. The gun was lying at the spot where appellant's stomach had been. Hamaoka noted there was no longer a bulge in appellant's right pocket. Archie picked up the weapon and saw that it was loaded. There were no other people in that spot and no other objects on the ground.

The bystanders were increasingly hostile, and officers had to push people out of the way to get to the street. Other officers formed a barricade to push the crowd away. Archie searched appellant before putting him in the police car, and he found a baggie of marijuana in appellant's right front pants pocket. Archie did not recall finding three cell phones on appellant. Archie examined the pistol and found there were six rounds and one in the chamber, and the gun was in working condition.

Hamaoka also patted down appellant before putting him in the patrol car and did not recall feeling anything that could have been a cell phone. He did not believe the bulge he saw was caused by a cell phone because the object sitting in appellant's pocket was very heavy and was pulling down on the pant leg. Also, the outline of the object was more prominent when appellant was stepping back. Although appellant's shirt was hanging down to his crotch area, the pockets were at the mid-thigh area and visible. The gun was checked against the police automated firearm system, and no registration for the gun existed.

Hamaoka was of the opinion that the Bounty Hunter Bloods are a criminal street gang with 2,000 to 2,500 members. He described their territory, hand signs, and primary activities, which included burglary, robbery, murder and narcotics sales. Hamaoka testified to prior crimes committed by two different Bounty Hunter Blood members. Hamaoka was familiar with appellant from field interviews conducted in Nickerson Gardens, and he knew appellant had the moniker of "Cheeto" and, formerly, "Little Roy." The Bounty Hunter Blood members were subject to an injunction that prohibited them from associating in public with one another, drinking in public, and being involved in any kind of illegal activity. Hamaoka testified regarding a document that showed proof that appellant was served in 2006 with the gang injunction. Hamaoka believed the instant offenses were committed for the benefit of the Bounty Hunter Bloods.

Defense Evidence

Fernessa Swisher (Fernessa), appellant's aunt, attended a family gathering on August 4, 2007, at the 109th Street park. There were three inflatable party jumpers for the children.[3] Appellant arrived at the gathering at approximately 1:00 or 2:00 in the afternoon. Appellant was wearing a long shirt that was not tucked in, and one could not

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[3] Archie had noticed an inflatable party jumper in the park. He knew that gang parties typically include the children and parents of gang members as well as friends and acquaintances.

see the outline of his clothing underneath. Fernessa testified regarding a photograph from that day showing family members, including appellant.

Fernessa lived in Nickerson Gardens and knew that the Bounty Hunter Bloods gang was claimed by the people there and that they wore red. She did not know if there were any Bounty Hunter Blood members in the park on that day. She did not notice if anyone besides her was wearing red. She never saw appellant hanging around gang members or anyone else because he was a loner.

Elizabeth Swisher (Elizabeth), appellant's mother, was not at the gathering in the park. Appellant is left-handed and owned three cell phones on August 4, 2007. Elizabeth had one of the cell phones in her possession at trial because appellant had given it to her. She identified two other phones at trial. Appellant usually carried all three phones in the same pocket, but she did not know if he carried them that way on August 4, 2007. Appellant is not a member of Bounty Hunter Bloods.

DISCUSSION

I. Motion to Suppress

A. Appellant's Argument

Appellant argues that Hamaoka's observation of a bulge in appellant's pants pocket from a distance of 20 to 30 feet cannot justify appellant's physical detention, foot pursuit, and tackling to the ground. The evidence of the gun should therefore have been suppressed.

B. Relevant Authority

On appellate review of a trial court's ruling on a motion to suppress evidence, the appellate body must accept the trial court's resolution of disputed facts and its assessment of the credibility of witnesses if supported by substantial evidence. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301; *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 823.) The trial court has the power to decide "what the officer actually perceived, or knew, or believed, and what action he took in response." (*People v. Leyba* (1981) 29 Cal.3d 591, 596.)

In the second step of a review of the grant or denial of a motion to suppress, the appellate court is required to independently apply the law to the factual findings. (*Ornelas v. United States* (1996) 517 U.S. 690, 696-698; *People v. Loewen* (1983) 35 Cal.3d 117, 123.) The appellate court must determine if the factual record supports the trial court's conclusions as to whether or not the detention met the constitutional standard of reasonableness. (*Ornelas v. United States*, *supra*, at p. 696 [determination of reasonable suspicion a mixed question of law and fact]; *People v. Lawler* (1973) 9 Cal.3d 156, 160; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 969.)

"The federal Constitution's Fourth Amendment, made applicable to the states through the Fourteenth Amendment, prohibits unreasonable seizures. Our state Constitution includes a similar prohibition. [Citation.] 'A seizure occurs whenever a police officer "by means of physical force or show of authority" restrains the liberty of a person to walk away.' [Citations.]" (*People v. Celis* (2004) 33 Cal.4th 667, 673.) "When the seizure of a person amounts to an arrest, it must be supported by an arrest warrant or by probable cause. [Citation.]" (*Ibid*.) "Because an investigative detention allows the police to ascertain whether suspicious conduct is criminal activity, such a detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.' [Citations.]" (*Id*. at p. 674.) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

C. Proceedings Below

We limit our review to the suppression hearing evidence and ignore additional or contrary evidence adduced at trial. (*People v. Superior Court* (*Mahle*) (1970) 3 Cal.App.3d 476, 482, fn. 3, disapproved on other grounds in *People v. Turner* (1984) 37 Cal.3d 302, 318.) Hamaoka testified that he was in uniform and driving the marked patrol vehicle on August 4, 2007. It was daytime. Appellant was "standing by himself

but amongst other people"—approximately five feet away from a group of 15 persons. The people in the group were drinking from beer and hard liquor containers and the smell of marijuana was obvious. Appellant made eye contact with Hamaoka and his eyes widened with surprise. He took a couple of steps backward and looked to his left and right. In Hamaoka's experience, people who do this are looking for an avenue of escape. Hamaoka was 20 feet from appellant, and he saw "the distinct bulge in his right front pants pocket." It was a bulge of approximately four inches that sat horizontally at the bottom of the pocket and weighed down the pants leg. It was something very heavy.

Appellant started to walk away from the officers. Hamaoka believed appellant had a gun. He knew that appellant and the men in the group were members of the Bounty Hunter Bloods. When the gang members "dress down" in red at gang parties it shows their unity and creates fear and intimidation in the community. On these occasions, they are frequently armed, and this played a part in Hamaoka's opinion that appellant had a gun. This was in addition to his furtive movements and look of surprise.

When appellant walked away, Hamaoka came up behind appellant and placed a "C-grip" on appellant's right arm. He did not ask appellant to stop before doing this. He did this because he believed appellant was armed. He then asked appellant to stop, but he did not, which added to Hamaoka's belief appellant was armed. Appellant pulled his arm away, swore and started running.

Hamaoka caught up with appellant and pulled him to the ground by his shirt. There was no one in the vicinity and there was nothing on the ground. When appellant was lifted off the ground, there was a gun on the ground that had been underneath appellant. Hamaoka believed the gun came from appellant's right front pants pocket. When appellant was lifted up he no longer had a bulge in his pocket. Except for his shoes, appellant was not wearing red.

The trial court stated that it was going to deny the motion to suppress based on the circumstances. The trial court recognized that Hamaoka was an expert and his detail was to investigate the Bounty Hunter gang. He smelled contraband and saw the bulge and

furtive movement. "In putting that altogether I think he had a right to stop the defendant. It wasn't completely that intrusive because of the movement of the defendant. And so considering the kind of resistance it was not unreasonable for him to stop him and take him down because of the suspicion that a gun was involved."

D. Motion Properly Denied

We believe that, under the totality of the circumstances, Hamaoka was justified in detaining and then seizing appellant. In determining the propriety of an investigatory detention, the guiding principle is "'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' [Citations.]" (*People v. Wells* (2006) 38 Cal.4th 1078, 1083.) We make such a determination by examining "'the totality of the circumstances'" in the case. (*Ibid*.)

In *Terry v. Ohio* (1968) 392 U.S. 1, the United States Supreme Court upheld temporary detention for less than probable cause, and allowed for "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." (*Id*. at p. 27.) However, in justifying the particular intrusion the officer must be able to point to specific and articulable facts which, taken together with rational inferences he is entitled to draw from these facts in light of his experience, reasonably warrant that intrusion. (*Id*. at pp. 21, 27.) "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. [Citations.]" (*Id.* at p. 27.)

This case is similar to that of *In re H.M.* (2008) 167 Cal.App.4th 136 (*H.M.*), where a detective in 18th Street gang territory saw a known gang member, H.M., running across the street in heavy traffic. H.M. was sweating heavily and kept looking back as he ran. "His facial expression suggested he was 'trying to get away from something,'" and he seemed "confused and nervous." (*Id*. at p. 140.) The detective detained H.M. for

crossing the street illegally, although his real concern was the reason for H.M.'s running, since it suggested criminal activity committed by him or against him. (*Id*. at p. 141.)

Like Hamaoka, the detective in *H.M.* wanted to investigate the possibility of criminal activity based on his knowledge of the area, his prior experience, H.M.'s demeanor, and H.M.'s actions. The detective decided to perform a patdown search for a weapon and grabbed H.M.'s hand or wrist and ordered him to step towards a wall. The search revealed a small, loaded semiautomatic handgun in the young man's pocket. H.M. was arrested. (*Ibid*.)

The reviewing court ruled that the detective's initial stop of H.M. was clearly lawful under *Terry*, since it constituted an ordinary traffic stop based on H.M.'s act of illegally crossing the street in traffic in violation of Vehicle Code section 21954. (*H.M., supra,* 167 Cal.App.4th at p. 142.) In the instant case, appellant was clearly in violation of the gang injunction.

The *H.M.* court also concluded that the trial court correctly held the detective had a reasonable suspicion H.M. was armed based on his "unusual, suspicious behavior" of running through traffic, his facial expression and the glances behind his back, which suggested flight. This was reinforced by his sweating and nervous appearance. (*H.M., supra*, 167 Cal.App.4th at p. 144.) "Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." (*Ibid*., citing *Illinois v. Wardlow* (2000) 528 U.S. 119, 124.) H.M. was also known to the detective's accompanying officers, suggesting previous police contacts. (*H.M. supra,* at p. 144.) These circumstances correspond to those in the instant case.

The *H.M.* court also cited the location of the stop as an especially significant factor, stating, "[w]e cannot overlook the reality that in the 40 years since *Terry* was decided, the problem of criminal street gangs has escalated. It is common knowledge that in Los Angeles, gangs have proliferated and gang violence is rampant. [Citation.] As recognized by our Supreme Court, the threat posed by violent street gangs 'is of the most serious dimensions and state policy urgently seeks its alleviation. . . .' [¶] It is likewise

common knowledge that members of criminal street gangs often carry guns and other weapons. 'When rival gangs clash today, verbal taunting can quickly give way to physical violence and gunfire. No one immersed in the gang culture is unaware of these realities, and we see no reason the courts should turn a blind eye to them.' [Citations.]" (*H.M., supra,* 167 Cal.App.4th at p. 146.) The court noted that the detective, based on his experience, "was certainly aware of the increased likelihood of encountering weapons in the area." (*Ibid*.)

We believe Hamaoka articulated more than sufficient facts to justify a reasonable suspicion that defendant had a gun and that an investigation was necessary to determine if his suspicion was correct so as to neutralize any threat of physical harm to the officers or others. As noted, the location of an encounter, although not enough to establish reasonable suspicion, may be sufficient when combined with other information available to the officer at the time of the detention. (*Illinois v. Wardlow, supra,* 528 U.S. at p. 124.) We may also consider the officer's training and experience in evaluating particular situations. (*United States v. Cortez* (1981) 449 U.S. 411, 418.) Here, the location of the party, the makeup of the attendees, appellant's demeanor and suspicious behavior along with Hamaoka's knowledge of gang behavior at gang parties and his sighting of the distinctive bulge in appellant's pocket all justified a temporary detention of appellant. Moreover, the gang members, including appellant, were violating the gang injunction. A patdown search would undeniably have been proper, since, as stated in *Terry*, Hamaoka "observe[d] unusual conduct" that led him "reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous," and "nothing in the initial stages of the encounter serve[d] to dispel his reasonable fear for his own or others' safety." (*Terry, supra*, 392 U.S. at p. 30.) Appellant, however, thwarted Hamaoka's attempt to make "reasonable inquiries." (*Ibid*.) The evidence indicates that Hamaoka attempted to initiate a routine consensual encounter with appellant but was prompted to detain him because of his surprise and alarm and rapid departure when Hamaoka approached. Hamaoka's

placing of a "C-grip" on appellant's arm did not constitute a seizure, since appellant not only believed he was free to leave, but did so. (*People v. Celis*, *supra*, 33 Cal.4th at p. 673. The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. (*People v. Souza*, *supra*, 9 Cal.4th at p. 242.)

As stated in *H.M.*, """we must allow those we hire to maintain our peace as well as to apprehend criminals after the fact, to give appropriate consideration to their surroundings and to draw rational inferences therefrom, unless we are prepared to insist that they cease to exercise their senses and their reasoning abilities the moment they venture forth on patrol." [Citation.]' [Citations.]" (*H.M.*, *supra*, 167 Cal.App.4th at p. 147.) Furthermore, "'[f]ailure to cursorily search suspects for weapons in a confrontation situation in an area where gang activity and weapon usage is known from the officers' past experience would be most careless.' [Citation.] Officers are not required to take unnecessary risks in the performance of their duties. [Citation.] When an officer observes conduct giving rise to a reasonable suspicion an individual is involved in criminal activity, and that activity occurs in an area known for recent, violent gang crime, these facts together go a long way toward establishing reasonable suspicion the individual is armed." (*H.M.*, *supra*, at p. 147.)

Exercising our independent judgment, we agree with the trial court's decision to deny appellant's motion to suppress.

II. Prosecutor's Peremptory Challenge

A. Appellant's Argument

Appellant contends that the prosecutor's reasons for excluding potential Juror No. 11 were vague, not logically compelling, and not supported by the record. In addition, the trial court did not make a reasoned and sincere attempt to evaluate the prosecutor's justifications. Appellant argues that reversal of the judgment is required.

B. Relevant Authority

The state and federal Constitutions prohibit an advocate from using peremptory challenges to exclude jurors based on race. (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) In *Wheeler, supra,* 22 Cal.3d 258, the California Supreme Court held that "the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16, of the California Constitution." (*Wheeler*, at p. 272.) A prosecutor violates that right by using peremptory challenges to strike prospective jurors who are "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds," when the challenges are made "on the sole ground of group bias." (*Id*. at p. 276.)

In *Batson, supra,* 476 U.S. 79, the United States Supreme Court set out a three-step inquiry for resolving a *Wheeler/Batson* motion. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.] The three-step procedure also applies to state constitutional claims. [Citations.]" (*Lenix, supra*, 44 Cal.4th at pp. 612-613; *Johnson v. California* (2005) 545 U.S. 162, 168 (*Johnson*).)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to

evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' [Citation.]" (*Lenix*, *supra*, 44 Cal.4th at pp. 613-614, fn. omitted.)

C. Proceedings Below

Prospective Juror No. 11 said she lived in Gardena and was not married. She was a senior at the University of Southern California, majoring in psychology. She had never been on a jury before. She planned to go to graduate school and obtain a degree in clinical child psychology.

When the peremptory-challenge phase of voir dire began, the People accepted the panel. The defense excused a juror (a law enforcement officer), and the People excused that juror's replacement (Juror No. 14, who was a full-time student). The defense next excused Juror No. 2, a full-time student, and the People excused Juror No. 9, who was also a full-time student. The defense excused then-Juror No. 5, who was a data coordinator from Watts (initially Juror No. 15), and the People excused Juror No. 11. At this point, the defense asked to be heard out of the presence of the jury and the court adjourned for the day.

Defense counsel made a *Wheeler* motion, stating, "My client is Black. I noticed looking at the jury pool earlier today that there are only four Black people in the entire jury pool. One of them was in the jury box and the prosecutor took her out of the jury box on her last challenge. And if the court denies it, I would like to reserve the right to continue to make that motion if she challenges any other Black jurors. Because I think it's going to be extremely difficult with this pool to assemble a jury of my client's peers."

The trial court stated, "Out of abundance of caution, the court is going to find a prima facie case has been made." The following exchange then occurred:

"MS. ROSBOROUGH [prosecutor]: Your honor, it appears that in addition to the juror that was just excused, I believe Juror No. 10 is also an African American male. And I saw at least three African American women out in the audience.

"THE COURT: Okay. And the reason for excusing Juror No. 11.

"MS. ROSBOROUGH: Your honor, Juror No. 11 is a student. She's a psyche major. I thought maybe she would over think the entire process because she's a psyche major. That's why I excused her.

"THE COURT: Anything else from the defense?

"MR. MASHBURN [defense counsel]: No. Submitted, your honor.

"THE COURT: All right. Okay. So the court finds that the reason is that No. 11 was excused was race neutral, had nothing to do with her race. I might also indicate, what this court does is this court basically makes a note of the ethnicity of every juror, every prospective juror in this particular case. I do it every jury trial. And I can tell you with respect to this particular case the prosecution basically has excused three jurors: one a Latino, one a white male, ironically the last name of Webster, and another No. 11 was excused. And in each and every—the three that the prosecution has excused, they've all been students. With respect to the defense, the defense has excused a white female who was a police officer, an Asian male who was a student, goes to U.C.S.D. and a Latina, No. 15. So defense has exercised one Latina, one Asian and one White. The People, one African American, one Latina and one White. So that's basically it. So as I indicated, I have no problems. You can make as many *Wheeler-Batson-Johnson*'s both sides if you care to. I do record the ethnicity of every prospective juror and what they do. So I pretty much keep a rolling tally myself. All right. With that it's denied."

D. **Wheeler *Motion Properly Denied***

"At the third stage of the *Wheeler/Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even

the common practices of the advocate and the office who employs him or her. [Citation.]" (*Lenix, supra,* 44 Cal.4th at p. 613.)

We believe the trial court demonstrated "a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known," and that its decision is therefore entitled to deference. (*People v. Hall* (1983) 35 Cal.3d 161, 167–168; *People v. Arias* (1996) 13 Cal.4th 92, 136.) In fulfilling its obligation to make this sincere and reasoned effort, "the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine." (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.) The trial court was clearly keeping close watch over the peremptory challenges and particularly to the issue of race. The prosecutor gave a race-neutral reason for its challenge to Juror No. 11, and the trial court found it credible. "A prosecutor asked to explain his conduct must provide a '"clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' [Citation.]" 'The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.]" (*Lenix, supra,* 44 Cal.4th at p. 621.)

We believe the record shows that the prosecutor's strategy evolved as the composition of the jury changed. The prosecutor accepted the panel with Juror No. 11 on it and declined to exercise its first opportunity for a peremptory challenge. At that time there were four students on the panel, Nos. 1, 2, 9, and 11. When the defense challenged the law enforcement officer (No. 5), the officer was replaced by another student, and the prosecutor challenged that student at the next opportunity. The defense next challenged a student, Juror No. 2. The prosecutor then challenged a full-time engineering student, Juror No. 9. When the defense challenged Juror No. 5, formerly No. 15, a data coordinator who had told the court about bad experiences with gangs, the prosecutor challenged Juror No. 11, and the *Wheeler* motion was made.

As stated in *Lenix*, "[T]he selection of a jury is a fluid process, with challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empanelled. As we noted in *People v. Johnson* (1989) 47 Cal.3d 1194: '[T]he particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or [by] peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors. [Citation.]" (*Lenix, supra*, 44 Cal.4th at p. 623.)

Although, as appellant points out, a child psychologist remained on the panel (Juror No. 3), the record indicates that this juror was older and had more life experience than No. 11, who was a junior in college. Also, Juror No. 3's brother was shot by members of a gang, and her father had cars stolen, presumably by gang members. She therefore would reasonably be perceived as a sympathetic juror for the prosecution. We note that this juror was subsequently excused by the defense. This was no doubt attributable to her family's experiences with gangs rather than because, as appellant states with some derision, the defense apparently believed that child psychologists may not be disposed to *defense* arguments.

Appellant argues that other students were left unchallenged by the prosecution, but his notes are not fully accurate. Juror No. 1 was a computer science student, and the prosecutor was always willing to accept him, it is true. Juror No. 7, however, was not a

student but rather a Certified Nursing Assistant. Juror No. 14 was a student, but she *was* challenged by the prosecution (after she replaced Juror No. 5). The other students named by appellant were not part of the venire at the time of the *Wheeler* motion. "[T]he trial court's finding is reviewed on the record as it stands at the time the *Wheeler/Batson* ruling is made." (*Lenix, supra,* 44 Cal.4th at p. 605.)

Contrary to appellant's contention, the trial court's failure to make detailed factual findings is of no moment. As the California Supreme Court stated in *People v. Jackson* (1996) 13 Cal.4th 1164, 1197–1198, *Wheeler* does not require the trial court to conduct further inquiry into the prosecutor's race-neutral explanations if it is "satisfied from its observations that any or all of them are proper." "Where, as here, the trial court is fully apprised of the nature of the defense challenge to the prosecutor's exercise of a particular peremptory challenge, where the prosecutor's reasons for excusing the juror are neither contradicted by the record nor inherently implausible [citation], and where nothing in the record is in conflict with the usual presumptions to be drawn, i.e., that all peremptory challenges have been exercised in a constitutional manner, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a *Batson/Wheeler* motion denied, notwithstanding that the record does not contain detailed findings regarding the reasons for the exercise of each such peremptory challenge." (*People v. Reynoso, supra,* 31 Cal.4th at p. 929.)

We conclude that substantial evidence supports the trial court's rulings regarding the excusal of prospective Juror No. 11. It is "discernable from the record that (1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race neutral; (2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and (3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges."

(*Lenix, supra*, 44 Cal.4th at p. 625.) We therefore conclude the trial court did not err by denying appellant's *Batson/Wheeler* motions.

III. Counsel's Failure to Move to Bifurcate Gang Allegations

A. Appellant's Argument

Appellant contends that trial counsel could have persuasively argued that the testimony of the gang expert would taint the jury on the underlying charges and that bifurcation was appropriate. Counsel's failure to do so, appellant argues, resulted in prejudice to him. Even though the jury found the gang allegations untrue, the evidence could not help but poison the jury on the substantive counts.

B. Relevant Authority

In order to sustain on appeal a claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient and it is reasonably probable defendant would have achieved a more favorable result in the absence of the asserted error. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) Trial counsel's performance may be deemed deficient only if "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) Furthermore, a defendant must affirmatively show that it is reasonably probable a determination more favorable to him would have resulted in the absence of counsel's failings. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*); *People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218.) A reasonable probability is one sufficient to undermine confidence in the outcome. (*Strickland, supra*, at p. 694.) An appellate court need not address both prongs of the test before rejecting a claim of ineffective assistance of counsel. (*Id*. at p. 697.)

C. Counsel Not Ineffective

A gang enhancement allegation differs from a prior conviction allegation in that it is "attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*).) The need to bifurcate a gang enhancement allegation is therefore far less than for a prior conviction

allegation, and the trial court has broader discretion in determining whether to bifurcate a gang enhancement allegation than in making the same determination regarding a prior conviction enhancement allegation. (*Ibid*.) A defendant must "'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.'" (*Id*. at p. 1051.)

In *Hernandez*, the Supreme Court pointed out that "evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*Hernandez, supra*, 33 Cal.4th at p. 1049.)

The evidence of appellant's gang membership was relevant to establishing a motive for possessing a gun as well as a rationale for the police actions toward him. The prosecutor was entitled to show the jury the totality of the circumstances leading up to appellant's arrest for the charged crimes, and gang customs and behavior were an important aspect of this picture. This required admission of evidence of appellant's gang membership and expert testimony about the habitual behavior of gangs. The need to provide this context weighed heavily against bifurcation of the gang enhancement allegations, and appellant has not shown that it was prejudicial, especially since the allegations were not found to be true. It is unlikely that the gang evidence prejudicially influenced the jury to find appellant guilty of the firearm violations, given the circumstances that appellant ran from police, was seen trying to grab something in his clothing as he ran, and the fact that the gun was found beneath appellant's body after he was lifted up from the ground.

Moreover, the evidence offered in support of the gang allegation that was not relevant to proving the charged offense—such as testimony that two gang members were convicted of the sale of drugs and carrying a concealed firearm—was not unduly

prejudicial, since these offenses were not more inflammatory than the instant offenses. Here, as in *Hernandez*, "[a]ny evidence admitted solely to prove the gang enhancement was *not* so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of [appellant's] actual guilt." (*Hernandez, supra,* 33 Cal.4th at p. 1051, italics added.)

Since a motion to sever or bifurcate would have been properly denied, and any error in the failure to sever or bifurcate the gang element would have been harmless, appellant has not established that he suffered prejudice from counsel's omissions, even if counsel failed to bring such a motion. (*People v. Maury* (2003) 30 Cal.4th 342, 392-394; *People v. Boyette* (2002) 29 Cal.4th 381, 430-431.)

IV. Failure to Instruct on Defenses of Necessity And Duress

A. Appellant's Argument

Appellant contends that the defenses of necessity and duress should have been put before the jury, either by efforts of trial counsel or sua sponte by the court. According to appellant, these defenses were relevant because there was testimony and argument offered by the People that gang members often arm themselves at large gatherings in fear of becoming targets for drive-by shootings. He argues that this court should reverse the judgment and provide guidance on this issue to the lower court in event of a retrial. Even if the two defenses are distinct, appellant asserts, the same factual situation may give rise to both of them.

Appellant also notes that the *Heller* case reaffirmed the Second Amendment protection of an individual's right to possess a firearm and use it for traditional lawful purposes, and he argues that a blanket prohibition of the possession of firearms runs afoul of the Second Amendment. (*Heller, supra,* ____ U.S. ____ [128 S.Ct. 2783].)

B. Relevant Authority

A trial court is obliged to instruct, even without a request, on the general principles of law that relate to the issues presented by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) A defendant has a right to an instruction that pinpoints the theory

of the defense; but the judge must give only those instructions supported by substantial evidence, and must refuse instructions on a defense theory for which there is no supporting evidence. (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386; see also *People v. Marshall* (1997) 15 Cal.4th 1, 39–40.) The standard of review for claims relating to alleged instructional error is de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, disapproved on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

C. No Evidence in Support of the Defenses

In order for the duress defense to apply, "[t]he defendant must show that the act was done under such threats or menaces that he had (1) an actual belief his life was threatened and (2) reasonable cause for such belief. [Citation.]" (*People v. Heath* (1989) 207 Cal.App.3d 892, 900.) A defendant must have committed the criminal act in response to an immediate and imminent danger. (*Ibid.*) "'[A] fear of *future* harm to one's life does not relieve one of responsibility for the crimes he commits.' [Citations.] The person being threatened has no time to formulate what is a reasonable and viable course of conduct nor to formulate criminal intent. 'The unlawful acts of the person under duress are attributed to the coercing party who supplies the requisite mens rea . . . .' [Citation.]" (*Ibid.*)

Appellant would have merited an instruction on the defense of duress only if there had been substantial evidence he carried the gun because he reasonably believed his life would be in danger if he did not. The key to the defense of duress is the immediacy of the threat upon which the defense is premised. "'Because of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime. . . . [Citation.]' [Citation.] Decisions upholding the duress defense have uniformly involved '"a present and active aggressor threatening immediate danger."' [Citations.] A 'phantasmagoria of future harm' such as a threat of death to be carried out at some undefined time, will not diminish criminal culpability. [Citation.]" (*People v. Petznick* (2003) 114 Cal.App.4th 663, 676-677.)

Here, there was no evidence that anyone had threatened appellant or that harm, much less death, was imminent. There was no coercing party to whom appellant could attribute his unlawful acts. The testimony appellant cites regarding typical gang behavior was appropriately couched in generalities, since its purpose was to explain the customs of criminal street gangs at large gatherings. Accordingly, the trial court did not err in not instructing the jury on the defense of duress.

We also believe that there was no factual basis for appellant's claim of necessity. "An instruction on the defense of necessity is required where there is evidence 'sufficient to establish that defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency. [Citations.]'" (*In re Eichorn* (1998) 69 Cal.App.4th 382, 389.) "The standard for evaluating the sufficiency of the evidentiary foundation [to support a necessity instruction] is whether a reasonable jury, accepting all the evidence as true, could find the defendant's actions justified by necessity. [Citation.]" (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1539.)

Viewing the evidence in the light most favorable to appellant, we conclude appellant failed to show at a minimum that he had no adequate alternative, that he did not risk a greater danger than the one he purportedly sought to avoid, and that he did not contribute to the emergency. Appellant could have stayed home. The risk to police officers and other persons was greater than any danger appellant would have faced had he merely not participated. Appellant's actions of joining a criminal street gang and participating in its activities were the genesis of any danger he faced. The trial court properly did not instruct the jury on the defenses of duress and necessity.

Finally, the United States Supreme Court decision in *Heller* acknowledged that certain longstanding prohibitions affecting an individual's Second Amendment right to bear arms are proper. (*Heller*, *supra*, ____ U.S. ____ [128 S.Ct. at pp. 2816–2817 & fn.

26].) The longstanding prohibition against carrying an unregistered firearm and carrying a concealed firearm are not affected by *Heller*. (*People v. Flores* (2008) 169 Cal.App.4th 568, 575-576.)

V. Failure to Stay Sentences Under Section 654

A. Appellant's Argument

Appellant contends that his possession of a handgun in the park was clearly a single course of conduct. The trial court therefore improperly imposed separate concurrent sentences for all three weapon possession counts. Therefore, this court should order an amended abstract of judgment staying the sentences in counts 1 and 3 under section 654. Respondent agrees that appellant's sentence should be so modified.

B. Relevant Authority

Section 654 provides in relevant part: "(a) An[y] act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment[,] but in no case shall the act or omission be punished under more than one provision."

The protections of section 654 extend to situations in which several offenses are committed during an indivisible course of conduct. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.) Indivisibility is determined by the defendant's intent and objective. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) If all the offenses are incidental to, or the means of accomplishing or facilitating a single objective, the defendant may be punished for any one offense but not more than one. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

C. Judgment Must Be Modified

Appellant is correct in his assertion that the three weapons offenses of which he was convicted were part of a single course of conduct. Therefore, the judgment must be modified to stay the sentences in counts 1 and 3 pursuant to section 654.

DISPOSITION

The judgment is modified to stay the sentences in counts 1 and 3 pursuant to section 654. In all other respects, the judgment is affirmed. The superior court is directed to amend the abstract of judgment to reflect that the sentences in counts 1 and 3 are stayed and are not imposed to run concurrently.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

CHAVEZ